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ABSTRACT

This paper examines methods that postsecondary institutions can use to cope with faculty and staff incapability, focusing on schools and practices in the United Kingdom. It first discusses the nature and scale of faculty/staff incapability in the United Kingdom, reviewing relevant court decisions. It then examines administration responses to incapability that may result from incompetence, short-term sickness, and long-term illness. The paper suggests that administration responses to incapability need to address the purpose of action, coverage, stages, time limits, appeals, sanctions, and records. It also discusses the conduct of review panels, investigations, and hearings, as well as the relevance of communication, training, and collective bargaining agreements. Appendices offer guidelines and procedures for decision-making in determining incapability. (Contains 15 references.) (MDM)

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Mendip Papers

Coping with incapability

Bob Kedney and
Bob Saunders

The Staff College

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Mendip Papers

Coping with incapability

Bob Kedney and Bob Saunders

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Introduction

Quality is now one of the key issues in educational thinking. Given the nature of further education, this has to mean quality in the contribution made by people. Capability, or rather any alleged lack of it, is, therefore, a subject guaranteed to raise interest and debate. Until very recently, however, the focus of that debate has tended to be on intervention rather than putting in place a coherent and planned strategy to deal with the problem. Individual case histories, or at least anecdotes, abound; everyone, it seems, has a story to tell of a lecturer known to them whose work is of an unacceptable standard.

It has been observed that poor performance, left undetected and unresponded to, is unlikely to correct itself, but rather gets worse over time. For organisations that lay great stress on public service, responsiveness, educational standards and the pursuit of quality of learning opportunities, it is perhaps somewhat surprising that little attention has been paid to quality problems experienced by teaching staff themselves.

Explanations have in the past lain partly in the division of responsibilities between colleges and local education authorities (LEAs), partly in the lack of experience and reluctance of managers to handle uncertain and sensitive matters. The Education Reform Act 1988 responded to the first factor in that it shortened the chain of responsibility; the Further and Higher Education Act 1992 completed this process by making the college the employer and placing the responsibility clearly and solely with the college. The weakness of managers requires focused management development to give

more understanding, clearer objectives and more readiness to take action. The task of drawing up relevant personnel procedures and notes of guidance for managers can make a major contribution. This should, however, be seen as more than a technical exercise delegated to the relevant specialist manager.

The development of procedures for dealing with incapability can be regarded as a major initiative in its own right, or be set in a wider context. Capability procedures can be linked to other management policies involved with developments such as improved selection and induction practices, appraisal and the introduction of rules and procedures related to absence and discipline. The documents also need to be set in the context of, and related to, the other processes which form the continuum of the four Ps of personnel management; purpose (or mission); policies; procedures; and practice.

The college mission statement should provide clear guidance on basic values through the use of key words which need to be carried through into the operation of the institution. In this context references to quality, effectiveness, support for learning and caring, as well as efficiency and setting high standards, can underpin the design of college staffing policies. The business or strategic development plan and its supporting programmes should set out the relationships between public statements of intent and their critical values. They will thus demonstrate how quality services are to be provided within and by a caring community. They will clearly include personnel protocols and set down the college's expectations of its staff.

In practice, the initial motivation to sort out capability procedures may be in response to specific examples of poor performance, particularly where there are long-standing problems that need to be addressed. The primary focus will then be on how to deal with a worst case scenario. While this can usefully serve as a basis for testing ideas and proposals there is also a need to recognise the wider value of a capability procedure. Walton, for example, indicates that:

> In all cases where management genuinely believes an employee's performance is inadequate, the primary objective should be to get him or her to improve to the standard required, with dismissal as very much the last resort. (Walton 1992)

Taking such a position does not argue for tolerance of the unacceptable, or over-long processes that fail to serve the primary needs of students. Rather, it seeks to set issues of capability into a framework of other related management measures without denying the need for prompt action. It will define and translate care and concern for people and quality into meaningful action in relation to individuals and the wider college community.

In developing step by step advice, consisting of a procedure and associated notes for managers on how to address poor practice, there is a prime need to identify acceptable standards of behaviour. Setting expectations by personal example supported by an informal word in good time and on a consistent basis will form a foundation that will do much to set and raise standards. This, together with more formal advice and counselling, will form the greater part of a college procedure but more overt action should also be part of the repertoire of every line manager.

There can be a continuum of responses from merely clarifying peer group expectations from informal through to more formal management intervention that can lead eventually to dismissal.

The documentation needs to set out clearly who is charged with doing what. In general a guiding principle is likely to be to seek management action as speedily and as close to the alleged problem as is reasonable. The procedures should provide a framework which makes clear who will do what and what is expected of them. They should confirm that the responsibility lies with the manager, who is under a duty to follow up problems with employees which cannot be resolved by normal face-to-face discussion. The guidance should seek to indicate how the more formal stages of action should be initiated. Advice can be given in supporting notes for managers on the key tests of reasonableness and the balance of probabilities which should be underpin any recommendations or actions.

References have been made to procedures in the plural in relation to incapability. This recognises that any failure to perform adequately by a member

of staff can be due to more than one cause. Where the failure to perform is judged to be wilful (when it is believed that the individual could but is choosing not to behave reasonably) then the matter should be dealt with under the college's disciplinary procedure. If, however, in the judgement of the responsible manager the unacceptable performance is due to incapability, it may be caused by either ill health or incompetence. Two separate but related procedures are suggested here as ways of handling the difficulties. Whether disciplinary, ill health or competence procedures are utilised in a particular case, the final outcome could still be dismissal if all else fails.

What is incapability?

Wilful misbehaviour is generally more easily recognised and handled than incapability, thus a failure to carry out simple administrative tasks or meet commonplace disciplinary rules may be used as a basis for taking action. Poor timekeeping, incomplete registers, lax control of records of student work or the mishandling of cash or materials may be the preferred basis for management action, but may in reality be related to underlying incapability. It is clearly inequitable and unacceptable to treat colleagues with health problems or a genuine lack of skill or knowledge under a procedure designed for wilful misconduct. Having more than one procedure can, however, pose a problem for the line manager responsible as a choice of route has to be made at an early point in the process of investigation and action. It is necessary, though sometimes difficult, to determine whether the lack of adequate performance is caused by misbehaviour, ill health or lack of ability. If no action is taken, the manager could be personally open to a charge of incapability; through a lack of care for the needs of students and other staff. It is always possible to transfer, in the light of investigation of the facts and circumstances, from one procedure to another. A more sensitive and informed approach to problems can, therefore, be adopted if a college has a full set of procedures.

As indicated, there has been a general feeling in the past that it was easier to identify indiscipline than incapability and therefore easier to respond through that route. Some guidance and support can, however, be found for a more discriminatory approach. Very poor performance or long-term absence from work is readily identifiable as a cause for serious concern for the individual, for college management and for other staff and students. The issues here are often not those of recognising the problem, but rather of when and how best to act. Short and intermittent absences can also have a serious impact on the effective working of the college. The Employment Appeals Tribunal (EAT) judgement in International Sports Co. Ltd. v Thomson (1980) confirmed that this too can be grounds for fair dismissal. In summing up in that case the panel indicated that dismissal should be the outcome of a fair and reasonable process which incorporates:

- a fair review by the employer of the attendance record and the reasons for it;
- appropriate warnings, after the employee has been given an opportunity to make representations; and
- if there is no adequate improvement in the attendance record, it is likely that in most cases the employer will be justified in treating the persistent absences as sufficient reason for dismissing the employee.
  (International Sports Co. Ltd. v Thomson 1980)

Turning to issues of competence, or rather the lack thereof, the Court of Appeal, in reaching its judgement in the case of Taylor v Alidair Ltd. (1978) said that:

> Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact capable or incompetent. (And) the two questions are whether the employers honestly and reasonably held a belief that the employee was not competent and whether there was a reasonable ground for that belief.
> (Taylor v Alidair Ltd. 1978)

A year earlier the EAT recognised that it is relatively simple to arrive at an assessment when dealing with employees engaged in routine work. But 'It is more difficult when one is dealing with

such imponderables as the quality of management which in the last resort can only be judged by those competent in the field,' (Cook v Thomas Linnell and Sons Ltd. 1977). It is, in part, to make such judgements that senior staff are employed in colleges. Where competence is causing serious concern (and is still believed to be a problem after investigation and monitoring), action should follow because incapability strikes at the heart of the contract of employment, whether this is stated explicitly in writing or not. Viscount Simonds, on hearing Lister v Romford Ice and Cold Storage Co. Ltd. in the Court of Appeal (1957), confirmed that:

> It is, in my opinion, clear that it was an implied term of the contract that the appellant would perform his duties with proper care. (Lister v Romford Ice and Cold Storage Co. Ltd. in the Court of Appeal 1957)

He went on to reinforce his view with a reference in law which may help to put concerns over judgements of reasonable expectations of professional staff in colleges into context. He said:

> The proposition of law stated by Justice Willes in Harmer v Cornelius (1858) has never been questioned: when a skilled labourer, he said, artisan or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes.

A lack of capability is, therefore, a standard of performance which, in the judgement of a responsible manager, can no longer be tolerated. It is that which you deem to be unreasonable. To return to the case of Cook v Thomas Linnell and Sons Ltd. the EAT indicated that:

> It is important that the operation of the legislation in relation to unfair dismissal should not impede employers unreasonably in the efficient management of their business, which must be in the interest of all. (Cook v Thomas Linnell and Sons Ltd. 1977)

While there is a need to act reasonably in the interests of the individual, to fail to take action clearly does not meet the interests of all. By settling for unacceptable standards the college is neglecting students and staff both now and in the future.

A sound and clear procedure, supported by the briefing and training of middle managers, should help to resolve most issues well before dismissal has to be considered. There has to be clear recognition and acceptance that the starting point is not for a search for an external, universal definition of capability or adequate performance. Rather, the need is for recognition by managers that competence is situation specific and must take account of an institution's mission. It is for the managers to identify, set and support proper professional standards.

The scale of the problem

It has been argued that absenteeism, like a fungus, grows best in the dark, and the same can also be said of incompetence. Unless the college has data and analyses for staff which parallel those for setting and maintaining reasonable standards for students, little is likely to be known of the scale of absence and competence problems. Too often there is little certainty, or even a general feel for the real scale of the college's problems. However, a little illumination can go a long way towards showing how the college can raise its standards.

Some degree of guidance and comparison can be drawn from examples in related fields of employment. For example in its **Notes for managers: absenteeism** the Industrial Society (1982) indicates that:

> Many studies show that absence is distributed unequally among any group of staff. A few people (five -10 per cent) account for about half the total absence, and a few never have any at all.

An investigation into absence levels in the police found a loss of 1.1 million working days with a mean of 11.6 days per employee compared with seven or eight days in industry. The range, however, was from an average of 19.5 days for one force down to 7.1 days in another. A similar pattern, including the spread, was found for local government officers in the London boroughs by the Audit Commission. Turning to teachers in schools, the problems have led insurers to look

again at the terms of cover for absenteeism after Lloyds underwriters reported an estimated loss of £50 million in 1990. Little research has been undertaken relating to FE colleges but a partial review in one establishment found 13 lecturers had been absent for four or more weeks and in another just under two per cent of working time had been lost in single days on Mondays and Fridays alone. Of the 198 days lost across weekends over two teaching terms, six individuals accounted for 53 days, and of these, three had been absent on 39 Mondays and Fridays as single days.

The financial costs and disruption to teaching and learning are clearly very important. So too are the implications for the hidden curriculum of the college and the values it espouses. Johnson's Law suggests that 'the number of minor illnesses among employees is inversely proportional to the health of the organisation'. It can be argued that a college concerned with the dissemination of knowledge could be expected to know when its members of staff are absent. As a caring employer as well as one concerned to set and exemplify good standards a college cannot afford not to know. Measurement and analysis can thus be important first steps towards illumination.

Little seems to be known of levels of competence in colleges but in the absence of clear management action the normal curve of distribution could be expected to show examples of both excellence and incapability. In a study of employees in the USA, Steinmetz (1970) concluded that a quarter of the workforce were judged to require improvement in their performance. Of these the vast majority were considered capable of improving but three per cent of the workforce were defined as both unfit and unable to make improvement. The occasional subjective judgement in this country would seem to suggest that opinion here is similar as references are sometimes made to severe problems relating to only one or two per cent of the workforce. In a period of change with rising numbers of non-traditional students, new delivery methods, new assessment techniques, rapid curriculum change and the redeployment of staff from traditional areas as a means of avoiding redundancy, it may be possible that the proportion is currently somewhat larger. This position is clearly exacerbated where there is no lead from management to address problems at an early (or even a late) stage.

Even when taken together, the scale of serious problems due to health and competence may be limited in terms of simple volume. Perhaps of greater importance, however, is the qualitative need to care for individuals and to set and maintain reasonable practices for students and colleagues. It is difficult to see how an incorporated college can seriously aspire in its mission and strategies to have concerns for people and educational standards if it does not apply to itself a proper consideration of its own performance. To do so must demand the setting of adequate benchmarks for its staff and fair and reasonable procedures to ensure their delivery.

Management responses

It has been argued that the most common causes of poor work ability are:

- poor selection methods;
- inadequate training;
- insufficient understanding of the role; and/or
- a genuine lack of capacity.

The design of procedures to deal with incapability have, therefore, to be set in context. Important as it is to look to improved recruitment and selection this cannot address current difficulties, nor will it cope with the impact of rapid change on existing colleagues. Basing staff appraisal solely on the softer option of developmental outcomes is akin to regarding the appraisal process as the college equivalent of the confessional. Both need to be seen as inter-relating with a range of human resource strategies which use on-going guidance and informal advice to help reduce the need for more dramatic action. Setting standards and ensuring that they are known can form the basis of the informal 'word in time' which is a key tool of the effective manager. The strategies have to be seen as the essential early stages of a more formal procedure which can lead, if improvement is not forthcoming, to transfer or dismissal.

Drawing up and reviewing college procedures

Not all colleges currently have procedures to guide managers on how problems of staff absence and competence should be addressed. Those which do may need to undertake revisions in the light of

corporate status. The notes which follow draw upon a number of documents and Staff College courses in seeking to identify aspects which should be considered. They are given here as three linked checklists: the first (drawn from ACAS) addresses key principles; the second gives a technical checklist of contents; and the third explores a range of major issues which need to be addressed. While the perspectives differ to some degree there are also points of overlap. They may, however, serve to help staff who are involved in reviewing and testing a new draft procedure.

Contained within these checklists are a number of key stages which are then explored further. They include comments on the critical phase of investigation which forms the foundation for considering whether any further action is necessary, and if it is for deciding what matters should be considered at the formal hearing. The timescales for each stage and the options in terms of outcomes open to college managers are of particular importance when considering allegations of incapability. They call for a balancing of factors in arriving at a reasonable decision.

Key principles

The **ACAS Code of practice 1: disciplinary practice and procedures in employment** (ACAS 1977) specifies a number of essential features of a procedure which have been adopted and adapted here in the context of capability. They provide critical starting points and a basis for testing the document when it has been developed:

- the procedure should be in writing;
- it should specify to whom it applies;
- it should provide for matters to be dealt with (as) speedily (as is reasonable);
- it should indicate the actions which may be taken;
- it should identify the levels of management which have the authority to take various forms of action;
- it should provide for individuals to be informed of the concerns made against them and be given an opportunity to state their case;
- it should provide for individuals to have the right to be accompanied;
- it should ensure that action is not taken until the case has been investigated;
- it should ensure that individuals are given an explanation for any action that is being imposed; and
- it should provide a right of appeal and specify the procedure to be followed.

Structure and content

In his book **Industrial relations** (1987) Green details a series of elements which can provide a framework for reviewing the content of the college procedure. In all, it covers 13 elements, nine of which are identified here as being of particular relevance to the design and review of college procedures to deal with absence/health and competence issues.

1. Purpose/status: should cover who are the parties to the document, the status of their discussions and the date of the procedure. In particular it should indicate whether discussions with the recognised trade unions have been based on consultation or negotiation and, if the discussions are on-going, whether the draft is regarded as a management document or a joint guide.

2. Staff concerned: most colleges are moving from the old local authority practice of having two or more procedures, each relating to a different group of staff and discussed with different trade unions, to a single policy and procedure. The scope needs to be clearly stated

3. Coverage: the procedure should also state clearly what it covers and identify any related provisions. For example, if separate procedures are drawn up for staff discipline, absence, competence and appraisal, these should be identified. It may also be helpful to indicate that movement at an appropriate point in the review from one procedure to another may be deemed appropriate.

4. Stages: the procedures can be expected to move from the informal through to the more formal and will include investigation and an appeal hearing. The procedure should indicate who will be empowered and accountable for acting at each stage. Account will have to be taken of the principle of natural justice in that anyone participating at an earlier stage should not be involved in decision-making at any subsequent phase.

5. Time limits: procedures should not be over extended but should, so far as is possible, be reasonable by seeking to give the individual adequate time to improve, bearing in mind the needs of the students and the college. The procedure should specify the action to be taken in the event of a staff member's failure to attend a meeting; or if a request for deferment of a meeting is received.

6. Appeals: the procedure should make clear at each stage how appeals are to be handled, and by whom. The appeal could either take the form of a consideration of the specific issues which form the basis of the appeal, or of a complete re-hearing which will set those grounds in context.

7. Sanctions: a range of options should be set out in the procedure but some may need the prior renegotiation of the terms of contract of existing staff.

8. Records: minutes or notes of the hearings should be included as well as the submission of documentary evidence. Records should be confidential but will need to be kept as there may be an appeal or an industrial tribunal hearing. Records of interviews should be kept and may be shared. Where agreement has been reached on an action programme to be undertaken (with college support) by the member of staff, it should be signed by both parties. Notification of decisions should be confirmed in writing and should refer to the right of appeal, the timescale and the means of requesting such a hearing.

9. Alteration or termination of the procedure may occur from time to time as experience is gained. It is useful to recognise this in advance and to indicate how this will be done. Account will have to be taken of the status of the procedure as a management document or a collective agreement.

The checklist outlined above deals largely with technical and procedural issues and may be helpful during the several stages of discussion and drafting that can be expected. Testing of the draft against this and other checklists has proven useful in the past as a means of verifying progress. The reading of the draft by a third party who has taken no part in its preparation can also be valuable. This is particularly so in relation to checking technical accuracy, the clarity and the implicit values of the text. This could take the form of reference to a third party or the use of the procedure in a case study or role play exercise as part of the associated management development programme.

Key issues

Who does what?

It is essential that the procedure is clear about who will do what and in which sequence. The concepts of tackling issues close to source, and ensuring that the response relates to the perceived scale of the problem, are important here. Leaving problems or passing them up has too often led to a loss of sensitivity which has itself then become a further cause of difficulty. Initial action lies with the next-in-line manager unless it can be shown that there is an exceptional cause for doing otherwise.

As the procedure is related to and drawn from the policies of the college it is likely that it will be considered by the governing body. In terms of subsequent implementation governors are charged directly with having to address matters relating to 'senior staff' (as defined in the college's articles of government). Dismissal of and, therefore, other decisions relating to, all other staff are now matters for the principal or a senior manager to determine. The governors may, however, decide, as a matter of general principle, whether or not they wish to hear appeals against dismissal of staff arising from incapability. Should they choose to take the route of many other employers and delegate such matters to their senior management it follows that the principal cannot both hear the formal presentation and any appeal that may follow.

Flow diagrams can be helpful and **Figures 1-3** are drawn from the outline procedures given in the appendices. They can be completed by defining who will in future consider possible dismissal, and who may then hear the appeal if one is requested. Each figure will in effect need to be completed twice, once for senior posts involving the governors and secondly, for other staff.

Figure 1: Competence		
Stage	**Possible outcome**	**Responsible manager**
Investigation	Meeting	
Informal discussion	Caution/check understanding Action plan	
Monitoring	Trial period	
Formal interview	Written warning/ Alternative employment?	
Monitoring		
Final interview	Dismissal	
Appeal		

Figure 2: Short-term sickness		
Activity	**Possible outcome**	**Responsible manager**
Investigation		
Informal interview	Informal caution	
Formal interview	Formal caution/warning	
Medical advice		
Consult employee		
Action	Dismissal	
Appeal		

Figure 3: Long-term sickness

Activity	Possible outcome	Responsible manager
keeping in contact		
Assessment of impact	Discussions	
'Interview'	Advise of risk	
Seek medical opinion	Consult employee/consult college doctor	
Consider options		
Consult employee		
Decision	Give notice on full pay	
Appeal		

Size of panels

Reference is made here to the responsible officer in the singular. In the past, colleges have tended to use a panel. Given the nature of many of the cases of ill health and competence it is possible that hearings can be more sensitively considered by one or two people. Making one manager responsible does not, however, preclude the presence of a colleague acting as a witness or adviser.

Accompaniment

The ACAS guide (**Discipline at work: the ACAS advisory handbook,** ACAS 1987) refers to a staff member being accompanied at hearings by 'a trade union representative or workplace colleague' rather than the more open term of a 'friend'. The practice of introducing solicitors as 'friends' into hearings can significantly change the nature of the deliberations. It is important that the rules on who may accompany a staff member are clearly specified.

Expectations and interpretations

If the intention is to move to a single procedure to cover all college staff it may be helpful to make explicit reference to the standards management expects of different staff. The interpretation of what is considered competent or acceptable in terms of health has to be related to the need to carry out specific duties, and the impact of the work on the smooth running of the college. Given the wide diversity of activities across a college, it is clearly not possible to be completely specific. It is, nevertheless, possible to make a general observation that recognises differences in expectations between different jobs. For example, what may be considered critical in terms of frequent short-term absence could be shorter in total for the senior payroll officer than for an assistant caretaker. Similarly, the time target for demonstrating a return to acceptable levels of competency may be shorter for the college's specialist lecturer working alone with care in the community students than for an assistant technician who is a member of a team.

Time limits on cautions

The setting of time limits has to be related to the urgency of the college's need to achieve acceptable improvement in attendance or performance in a particular case. Any decision, therefore, has to fit the particular circumstances rather than be of a

pre-determined duration. A balance will have to be struck between the needs of the college and the individual but the time allowed should provide sufficient time to produce evidence of change. If specific required improvements are clearly defined this can be a matter of weeks rather than months.

Special cases

Recognition will need to be given in either the procedures or in associated management guidance to any particular provisions that may be made by the college for new staff on probation. Similarly, the requirement (recommended in the ACAS Code of Practice) to notify full-time officials before any action is taken against a college trade union officer, should be clearly stated.

Length of the procedure

The length and style of procedures varies in different organisation from short documents accompanied by briefings and training to longer documents. The latter attempt to cover all eventualities and to reduce any need for cross-referencing or individual interpretation of what are seen as key issues. In either case it has to be recognised that the written procedure will be drawn up by a relatively small group at a particular point in time. Its use will, however, be by others at some later date.

Future changes

Experience can be expected to highlight the need for fine tuning as lessons are learnt. It may thus be helpful to include in the procedure a recognition that review and revisions will take place, and how these are to be handled.

The investigation: reviewing the evidence

The first task is clearly to determine whether a problem actually exists, and if it does, to identify the nature and significance of the problem and the evidence to support such a judgement. Frank Walton recently offered the following questions at a conference as basis for an adequate investigation:

- What are the indications that the employee is not measuring up to the requirements of the job?
- Have there been complaints about, or criticism of, the employee's work from colleagues, customers or members of the public?
- Are there factual grounds to indicate inadequate performance such as poor results?
- Does the manager's own observation of the employee at work indicate dissatisfaction with his or her performance?
- Has the employee asked for help to overcome a problem?

Responses to such questions should identify facts and inform the formulation of judgements and an assessment of the significance of those findings. If the issue is one of absence from work, failure to adequately cover the syllabus or poor examination results, it is clearly possible to collect and analyse statistics. A start can then be made by drawing comparisons with other members of college staff and with employees elsewhere. Comparative analysis can, however, be no more than a beginning. Of particular concern will be the impact of the problem on the operation of the students and the college. Setting benchmarks for the review of individual as well as collective performance can be informative. Competence issues may be informed by such data as examination results, student attendance and the performance of standard tasks. For some posts-holders such as typists, cleaners or technicians, key duties may be relatively easy to assess. For others such as lecturers and managers, evidence will need to be collected by direct observation as well as by interviews. Qualitative consideration of the impact of inadequate performance may be less easy to collect than evidence of a failure to keep adequate plans, records of achievement or to cover the curriculum, for example. It calls for judgement and demands managerial rather than bureaucratic skills.

As part of the review it is clearly essential that the member of staff is kept informed of the alleged concerns and is given clear opportunities to respond. One of the critical tests at any later stage should be to question whether this has taken place, and whether from what was recorded every reasonable endeavour had been made to help the employee know the precise nature of the complaint.

This is sometimes easier to say than to achieve (as in the case of serious illness, or of a colleague who seems unable to accept or hear what is being said). However, this does not release the manager from the responsibility of trying to communicate this information.

In the case of absence due to illness, managers are not competent to make medical judgements. In such circumstances the employee should be asked to attend an examination by a nominated college medical officer, and to agree to his/her general practitioner providing information. When arranging a medical examination the college should provide a clear description of the duties of the post and any other relevant information such as the effects of the absence. The member of staff may not agree to the release of medical records by his/her GP but this must not prevent the college from requesting such advice and assistance. As Walton has indicated:

> If an employee refuses to be medically examined by a medical practitioner or specialist employed by the employer this fact alone will help the employer to demonstrate reasonableness if he subsequently decides to dismiss the employee. (Walton 1992)

The findings of the investigation need to be drawn together, shared with the member of staff and, if need be, presented at the next stage. A written record should be prepared stating the nature of the allegation, how the investigation has been carried out, what evidence has been produced and what is being recommended. Statements should be documented and preferably signed by witnesses, though in some instances this may not be possible or appropriate if the witness is unable or is unwilling to attend a subsequent hearing. For example, it may be judged more important to protect the author of an unsigned statement in a case of sexual or racial allegations concerning students.

The manager undertaking the investigation clearly has to have the power to determine, in the light of his/her enquiries, whether or not there is a case to answer. The manager should be empowered to propose a formal hearing and to present his/her findings. The employee should be given a copy, or at least a summary, of the statements of any persons who will not be at the hearing.

The hearing: arriving at a decision

When a formal hearing is arranged the senior staff charged with receiving the presentations should have played no previous part in the case. The employee should be advised of the cause and nature of the hearing, its possible outcome and that they may be accompanied. If the individual seeks deferment or fails to attend they need to be informed that the hearing has been re-arranged for a specific date and time. If then still unwilling or unable to attend, the hearing can reasonably proceed in the employee's absence. The employee should, however, have an opportunity for a representative to put his or her case, and/or to put forward a written submission.

There is a need to recognise the difference between handling incapability and discipline at the stage of formal hearings. In the case of Lynock v Cereal Packaging Ltd. (1988) it was clearly indicated that:

> These are not disciplinary cases; the system operated by the employer should involve a caution (not a disciplinary type warning) that the stage has been reached where, without better attendance, it will become impossible to continue the employment.

The EAT went on to catalogue a series of important factors that management could consider before reaching a decision. While these factors focused on ill-health, it is also possible to translate them into the context of incapability. They were:

- the nature of the illness;
- the likelihood of it, or some other illness, recurring;
- the length of the absence and length of periods of good health in between;
- the need for the work done by the employee;
- the impact of the work on other employees;
- the employer's policy and how it is carried out, and in particular the need for a personal assessment before dismissal;
- the extent to which the difficulty of the situation and the position of the company (college) is made clear to the worker so that he or she realises that the point of no return is near.

Possible outcomes

While it is necessary to consider dismissal as the ultimate outcome when drafting a college procedure it may also be helpful to recognise and build in the potential for a range of other options. These will range from finding no cause to take further action, through informal and formal counselling, to formal management action short of dismissal, such as a change of duties or the transfer to another post. Part of the process involves endeavouring to get the poor performer to accept ownership of the problem, including agreement to taking remedial action which will then be facilitated and monitored by the line manager.

Adequate investigation should support the formulation of a clear decision. If there is a need to go further it may be that the process of investigation and discussion, together with support and counselling, is considered sufficient. Where on-the-job or off-the-job training is necessary the identification of a mentor, the acceptance of clear tasks and the setting of milestones for review can provide an infrastructure. This will not always be the case, however, and from time to time other outcomes will have to be considered. Available options will have to conform to the terms of the contract but should include a caution concerning continued employment.

In reaching its conclusion in the case of James v Waltham Holy Cross (1973), the National Industrial Relations Court concluded that:

> If an employee is not measuring up to the job, it may be because he is not exerting himself sufficiently, or it may be that he lacks the capability to do so. An employer should be slow to dismiss upon the ground that the employee is incapable of performing the work for which he is employed to do without first telling the employee of the respects in which he is failing to do the job adequately, warning of the possibility or likelihood of dismissal on this ground and giving him an opportunity of improving his performance.

A number of alternative actions could lie between the formal caution and dismissal, depending on contractual terms and the provisions of the procedure. These could include demotion to a lower graded post or transfer to other duties. In both instances, however, the college is not expected to create jobs which do not or would not otherwise exist. In choosing to do so it is also necessary to take account of the reasonable aspirations of other staff. Where there is medical opinion to support it a request may be made to the appropriate pension scheme by the member of staff for retirement on health grounds. Reference has already been made to the use of the disciplinary procedure as an alternative route in some cases. A newspaper article in mid-1992 indicated that nearly half of the private sector companies surveyed 'admitted using redundancy to get rid of incompetent staff' (Daily Telegraph 10th July 1992). In other circumstances it may be that resignation is tendered with an application for early release before any formal decision is taken on capability. The 'good' reference and enhanced early retirement package are also not unknown in colleges. However, such practices raise both legal and moral questions as managers will be either using public funds to reward incompetence or failing to disclose information if an inaccurate reference is given.

Timescales

Once the college has decided to put in place procedures relating to competence and health, thought should be given to the timescales set out in the procedures. Reference has already been made to actions that may need to be taken, for example, to the period of notice of hearings. This period should be just adequate, not protracted. As it is part of a process already in hand, a week or two is more appropriate than the extended periods sometimes found at present.

In the case of a colleague who is ill it is clearly a matter for the medical specialist to consider if and when his/her health may return to a level where duties can be resumed. It is for the college to determine what the duties of the post are, whether there are any reasonable alternatives and how long it (the college) can afford to wait. The provision of full or half pay relates to a condition of employment, not the operational efficiency of the colleges and cannot be used as a yardstick or an expectation.

Trying to determine how long may be thought reasonable for a colleague to improve his or her

technical skills is also a matter of judgement, demanding that the particular circumstances are weighed and due consideration given (and demonstrated to have been given) to the interests of all those closely concerned. If a college has healthy financial reserves, adequate funding and no pressures on its recurrent budget, it may consider itself in a position to provide temporary cover for the employee and wait for a recovery from sickness, or give an extended period of support or secondment so that he/she may achieve acceptable levels of performance. Where students are at a critical stage in their programme a college will feel a particular need to intervene. If the institution is faced with contraction and compulsory redundancies managers may view the position differently.

Some guidance can again be drawn from key decisions of industrial tribunal and appeal hearings. In relation to absence, the EAT posed the following enquiry:

> The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer. (Spencer v Paragon Wallpapers Ltd. 1976)

The views of students, parents or employers, the impact on the balance sheet and the opportunity costs from other calls on limited funding have to be weighed against care and compassion for the individual by the sympathetic and caring employer in arriving at some measure of balance, however hard that may seem.

While there can be no single, specific response to how long a college can be expected to support a member of staff it is again possible to draw on some guidance from key case histories. Reference needs to be made to the issues a tribunal will address. The first is 'Was the dismissal for an admissible reason?'. Section 57(2) of the Employment Protection Consolidation Act 1978 defined capability as skill, aptitude, health or any other physical or mental quality relating to the performance of the kind of work the member of staff was employed to do. A manager may feel it easier (though still not easy) to decide on competence rather than health but as the EAT indicated:

> The decision to dismiss or not is not a medical question, but a question to be answered by the employer in the light of medical advice. (East Lindsey District Council v Daubney 1977)

References have already been made to the need to demonstrate reasonableness, and in particular to show that dismissal, if that is to be the ultimate outcome, was within

> ...the band of reasonable responses which a reasonable employer might have adopted'. (Lord Denning, British Leyland (UK) Ltd. v Swift 1981)

The requirement is not to prove incapability beyond all reasonable doubt but rather that the college has evidence to support its belief of incapability. The standard spught here is not whether another employer would arrive at the same conclusion in the same circumstances but rather that, on the balance of probabilities, the decision to dismiss could have been expected to be one of the options weighed.

The third question the tribunal can be expected to pose with regard to reasonableness is, 'Did the college as the employer behave fairly and reasonably in the events leading to the dismissal?'.

This implies having; sharing and adhering to a known and fair procedure. As the unreported tribunal hearing of Dale v Bedfordshire County Council indicated:

> There is no magic in the word 'procedure'; its importance lies in the fact that you cannot properly come to a decision on a matter such as capability unless the procedure is a fair one.
>
> (Walton 1992)

Communication and training

The drafting of a sound, even an excellent, procedure can only be the first stage of implementation. The real test of its worth will come when middle managers charged with implementation either use the procedure or feel unable to do so. Those not involved in the drafting cannot be as familiar with the spirit and intention

as those who were. Taking action in relation to colleagues who are sick or not performing adequately is not a pleasant prospect at the best of times and attitudes towards having to do so are often strongly held. The written document should, therefore, provide a starting point for implementation, not the total support.

Direct communication strategies will be needed to meet the different needs of different groups of college staff. For example, it is important that all staff know of the existence of the procedures and what is expected of them in relation to them. Colleagues can be informed in a variety of ways: circulation in the internal post with a covering memo, an open staff meeting, or discussion at departmental staff meetings with advice and guidance from the college personnel manager.

Middle managers need to be briefed on what is expected of them and what help they can call upon in terms of advice and support when considering taking action. In addition to dealing with knowledge, there will be a particular need to practise key skills such interviewing and investigation. This may be achieved effectively through role-play, possibly based on twinning for management training with a partner college.

Sources of advice

A variety of sources of advice and support is available, including written material, courses and conferences and consultancy. These can be used at the drafting stage for the procedure, its introduction into college and/or subsequently when it is in use. Management consultants and trainers specialising in personnel and industrial relations issues, including knowledge of the FE sector are offering their services. Specifically in the field of education the Colleges' Employers' Forum and The Staff College have indicated their intention to provide support and advice to employers, as have a number of specialist firms of consultants and solicitors. A number of written sources are also given at the end of this paper. The Advisory, Conciliation and Arbitration Service (ACAS) is always happy to advise an employer who is trying to draft good personnel procedures; this service is usually free of charge.

Collective agreements

It is a simple matter to start the process that leads to collective agreements, it is only necessary for both management and the recognised trade unions to agree that they will negotiate the draft. Once prepared the document will be binding in honour, but not in law unless this is specifically agreed, on both parties. Both sides can reasonably expect to negotiate any subsequent changes, unless a unilateral variation clause has been accepted and included. However, it is possible that here, as with discipline, the employer and/or the trade unions may prefer to seek to consult rather than to power share on the grounds that possible dismissal is a matter for management. It is, therefore, wise at the outset to clarify the status of any discussions.

Where a college inherits a collective agreement but sees the need to change it this can lead to difficulties. While collective agreements are normally not statutorily enforceable on the parties to the agreement, they may well be built into the contracts of employment of existing employees. The original contracts of most existing FE lecturers makes reference to pay and conditions of service 'agreed from time to time by the National Joint Council for Further Education Lecturers, as modified by local agreements'. This has the effect of incorporating into the contract of employment the terms of any collective agreements which affect individual rights. Since incorporation, the governing body of each college decides whether to accept, reject or modify national agreements, but the changes to pay and conditions which they adopt also become incorporated in contracts.

This can cause problems when changes are contemplated, because the term of a contract of employment, like any other commercial contract, cannot be varied unilaterally.

The safest course is to agree any change consensually with each employee. If an employee agrees to a change in contractual terms there is no problem. As reaching individual agreement with each employee is so time-consuming and difficult to achieve, it is often more convenient to re-negotiate the collective agreement with the unions who signed it in the first place. This can usually be relied upon to change the contracts of employment of all the employees for whom a union has bargaining rights. (There is, however, some

doubt about this if the contractual status of the collective agreements is in any way unclear and if the change proposed is to the employees' detriment.)

If it proves impossible to reach agreement on a change either with the employees as individuals or with the recognised unions, the only recourse the employer will have will be to dismiss the employee affected and at the same time offer them a new contract incorporating the required changes. In normal circumstances, provided the employer can show a sound business reason for the changes, has consulted and tried to reach agreement, and has given due notice, there is little danger that the employee can claim unfair dismissal. The dismissal will be for 'some other substantial reason', related to necessary business reorganisation, and can be justified by the implied term in every contract of employment that an employer has the right to reorganise to improve efficiency.

This rather draconian approach should only be used when really necessary, particularly at present where the freedom to dismiss is limited by the Acquired Rights Directive. As the transfer of colleges from LEA control to control by individual FE corporations is covered by this directive, any dismissal caused by the transfer itself is automatically unfair. Only dismissals related to technical, organisational or economic reasons may be defensible. Sound legal advice should be taken before any dismissal is contemplated.

Conclusion

One of the key guidelines argued here has been the need to draw up procedures which support the establishment and maintenance of professional standards. The need for them can be demonstrated simply by considering what you would regard as being reasonable in relation to the education of your own family. Reasonableness can be judged by the yardstick of how one would wish to be treated oneself in similar circumstances, either as a student or as a member of college staff. The development of a formal, written procedure for dealing with difficulties arising from staff absence and competence is, however, but one part of a wider process of establishing, sharing and maintaining key values. It has a particular significance in that it relates directly to judgements of professional and educational standards and will be a major and explicit step in maintaining and building the professional standards of the college.

The starting point may be to resolve current problems and seek correction of perceived ills through punitive action. But the creation of procedures can also represent sound forward planning by a caring employer, taking in hand the steps necessary to regulate performance in the workplace. There clearly has to be a balance in the interests of all and it is possible, on the introduction of a new procedure, that action will follow to address long-standing problems. Both competence and health procedures need, however, to form part of a wider battery of tools made available to managers charged with and expected to manage staff in these changing times.

References and bibliography

In addition to the listed references, all managers should familiarise themselves with their college's articles of government and any existing procedures for absence and competency.

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Taylor v Alidair Ltd. IRLR82 (1978) ICR445

International Sports Co. Ltd. v Thomson (1980) IRLR 340

Court of Appeal (1978) Taylor v Alidair Ltd.

Employment Appeals Tribunal (1980) National Sports Co. Ltd. v Thomson

British Leyland UK Ltd. v Swift (1981)

Lynock v Cereal Packaging Ltd. (1988) ICR 670

Appendices

Colleges will have access to the provisions of national consultations and negotiations through the Purple, Silver, Burgundy and White books. Any additions and/or variations arrived at locally will be available from the LEA, those relating to teachers and lecturers presumably having been drawn up in conjunction with the college. Procedures relating to groups of staff employed across the local authority such as administrative, technical and manual colleagues will have been developed by the director of personnel services on behalf of the council.

The following appendices are comprised of materials used and developed on Staff College conferences and workshops. They may be adapted and used by colleges as required.

List of appendices

Appendix 1: Essential elements of a short-term or intermittent sickness procedure

Appendix 2: Essential elements of a long-term sickness absence procedure

Appendix 3: Deciding action on long-term sickness

Appendix 4: Deciding action on intermittent short-term illnesses

Appendix 5: Reviewing your college's absence/ill health procedure

Appendix 6: Essential elements of a competence procedure

Appendix 1:
Essential elements of a short-term or intermittent sickness procedure

1. Hold informal interview to discuss the problem.
   Inform employee of possible risk to job.

2. Monitor attendance closely (see **Advisory booklet number 5: absence,** ACAS 1989).

3. Interview again, consider explanations. Review options of no action, possible misconduct or formal caution to be confirmed in writing (indicate that 'failure to improve attendance to a satisfactory level could lead to dismissal').

4. Assemble information including analysis of attendance record and refer to the medical officer.

5. Consult employee again and make management decision to:

   - take no action;
   - give further caution;
   - offer alternative employment;
   - dismiss; or
   - arrange retirement on grounds of permanent ill health if certified by medical officer.

Case law

Lynock v. Cereal Packaging Ltd. (1988) ICR 670
International Sports Co. Ltd. v. Thomson (1980) IRLR 340

Appendix 2:
Essential elements of a long-term sickness absence procedure

1. Keep in regular contact with member of staff.

2. Review:

   - if there is no indication of the employee returning to work; or
   - if the absence is no longer tolerable; the trigger is, therefore, not a pay consideration but the needs of the college.

3. Fully inform employee that his/her job is at risk.

4. Try to discover the true medical position:

   - consult employee about the requirement for an independent medical opinion;
   - arrange for the employee to see the college medical adviser.

5. College medical adviser examines employee and asks permission to obtain report from employee's doctor.

   The employee can, however, refuse permission, demand access to the report and ask for amendments under Access to Medical Reports Act 1988. (See **Discipline at work**, p70, ACAS 1987 for BMA-approved letter.)

6. When medical position is known, or best information has been gained, management must decide whether to dismiss having considered:

   - if a caution should be given first (note this is a caution **not** a warning).
   - is alternative work available (short of creating a job)?
   - is dismissal necessary for the efficient operation of the college?

7. Fully consult the employee at the final stage before dismissal.

8. Give notice at full pay even if sick pay has run out.

Case law

East Lindsey DC v. Daubney (1977)

Appendix 3: Deciding action on long-term sickness

When deciding whether or not to dismiss an employee with a long-term health problem, the employer should take into consideration:

- the type of illness and what the medical reports say about its likely outcome;
- whether the employee has been given the chance to get a second medical opinion;
- the employee's age and service record;
- what demands the job makes on the employee;
- how vital the job is to the organisation and how easy it is to cover the absence;
- how much the absence affects other employees;
- how thoroughly the problem, and the possibility of it resulting in termination of employment, have been discussed with the employee;
- whether a transfer to a less demanding post is an option;
- whether early retirement on a disability pension could be arranged;
- whether the period of sick pay has been exhausted; (although the continuation of sick pay entitlement does not necessarily make dismissal unfair); and sometimes, if the doctor forecasts a return to work in a reasonable time, it may be sensible to continue employment after sick pay is exhausted.

Appendix : 4
Deciding action on intermittent short-term illnesses

1. When an employee's absences occur frequently enough to interfere with the proper performance of the contract, the employer is perfectly entitled to take action, whether or not the absences are covered by medical certificates.

2. The employee will probably wish to secure medical reports, but if the periods of illness are episodic and unrelated to each other it may be impossible for a doctor to forecast likely future absence rates. In such cases medical reports are not essential.

3. It does not matter whether or not the employee is fit at the time of dismissal; what is important is the overall pattern of attendance and absence, and how this compares with average sickness rates in the college as a whole.

4. In making the decision whether or not to dismiss, the employer should take into consideration:

   - how disruptive the absences are and how difficult they are to cover;
   - the effect of the absences on work colleagues;
   - how the employee sees the situation;
   - whether there are any special circumstances which suggest that things may improve in future;
   - whether the situation has been thoroughly discussed with the employee and cautions about possible termination given. (The decision to dismiss should not come as a surprise.)

Case law

Lynock v. Cereal Packaging Ltd. (1988) ICR 670
International Sports Co. Ltd. v. Thomson (1980) IRLR 340

Appendix : 5
Reviewing your college's absence/ill health procedure

Introduction

The procedure should be reasonably comprehensive while still being user-friendly, i.e. it should be equally clear to both sides concerned with any review or hearing. This clarity of guidance on principles and procedures should be evident to those who were not involved in its drafting.

Method

Read through your college's procedure and, using the following list as starting points for analysis, see how clearly the document provides guidance to college managers. It is unlikely that any procedure will cover all the following points in sufficient depth to demonstrate both technicality and spirit but the procedure should address the issues most important to your college. Any key deficiencies should be identified.

Question	Action?	Manager responsible
1. Is the purpose of the procedure clearly stated?		
2. Who does the procedure relate to?		
3. Is the procedure supported by written rules/guidelines?		
4. Is there a requirement that they be distributed to all staff?		
5. Was the procedure discussed or negotiated with college staff?		
6. Is it clear who is responsible for initiating discussion of absence when necessary?		
7. Who would consider possible dismissal due to absence?		
8. Who will hear any appeal against absence?		
9. Is guidance given on time limits at each stage?		

Question	Action?	Manager responsible
10. Are the steps for reviewing long-term absence clearly laid down?		
11. What information/guidance should be given to the college's medical adviser?		
12. Does the procedure indicate the action to be considered if the employee refuses a medical examination?		
13. Are the stages for reviewing frequent short-term absence clearly laid down?		
14. Do they require that a warning of possible dismissal should be given?		
15. Are there parallel and related procedures concerning competence and discipline?		

Appendix 6:
Essential elements of a competence procedure

1. Ensure a proper investigation of the facts, circumstances, standards expected and standards achieved.

2. Define the problem specifically.

3. Discuss the problem with the employee and ask for an explanation.
   Substantiate the problem to the individual.

4. Ensure that the primary aim of the procedure is to gain improvement to the standard required.

5. Identify the need for the employee to own the problem.
   Set up an agreed action plan including:

   - training;
   - monitoring support; and
   - clear improvement targets.

6. Record carefully what takes place and what has been agreed.

7. Monitor progress over a set period.

8. Consider informing/consulting the relevant trade union on the problem/steps taken after discussion with the employee.

9. If there is an improvement, acknowledge success.
   If not, then conduct a formal interview to:

   - review the history of the problem;
   - review the actions taken to date;
   - define the short fall from the required standard;
   - give an opportunity to explain.

10. If necessary, give a written warning that the job is at risk.

11. Monitor again.

12. Conduct a second formal interview before considering dismissal.

13. Before the final decision to dismiss, consider alternative employment possibilities. For example:

    - mutually agreed demotion;
    - alternative employment.

14. Consider redundancy if there has been a change of job/demand for work.

15. Dismiss the employee.

16. Ensure they have the right to appeal.

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The Mendip Papers are a topical series of booklets written specially for managers in further and higher education. As managers and governors take on new responsibilities and different roles they face new challenges, whether in the areas of resource and financial management or in the pursuit of quality, the recruitment of students and the development of new personnel roles. The Mendip Papers provide advice on these issues and many more besides.

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